

1992

G. Kevin Jones v. The State of Utah, The University of Utah, The University of Utah Hospital, and Medical Center, and James M. Becker : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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IN THE UTAH COURT OF APPEALS

G. KEVIN JONES,

Plaintiff/Appellant,

vs.

THE STATE OF UTAH, THE
UNIVERSITY OF UTAH, THE
UNIVERSITY OF UTAH HOSPITAL and
MEDICAL CENTER, and JAMES M.
BECKER, M.D.,

Defendants/Appellees.

92-0403-CA

Case No. ~~920191~~
C88-2736

Priority No. 16

BRIEF OF THE APPELLEES

ON APPEAL FROM THE DECISION OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
HONORABLE LESLIE A. LEWIS, DISTRICT COURT JUDGE

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SEP 28 1992

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JURISDICTION

Jurisdiction for this appeal is conferred upon this Court by Utah Code Annotated § 78-2a-3(k).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Were the trial court's Findings of Fact, specifically those challenged by plaintiff, adequately supported by the evidence. A trial court's factual findings are given considerable deference because of the trial court's ability to assess the witnesses credibility and will not be disturbed on appeal unless they are clearly erroneous. Findings of fact are clearly erroneous if they are against the clear weight of the evidence, or if the appellate court reaches a definite and firm conviction that a mistake has been made. Western Capital & Securities v. Knudsvig, 768 P.2d 989, 991 (Utah App. 1989).

To mount a successful attack on the trial court's findings of fact, it is an appellant's burden to marshall all of the evidence in support of the trial court's findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence. When an appellant fails to meet this burden, the trial court's findings are accepted as valid. Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990).

2. Did the trial court err in its interpretation of U. C. A. § 78-14-4. A trial court's conclusions of law are examined by the appellate court for correctness and are accorded no particular deference. Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990).

3. Did the trial court err in finding as a matter of law that the continuing treatment doctrine was not applicable to this case and was not applicable in Utah since the passage of U.C.A. § 78-14-4. A trial court's conclusions of law are examined by the appellate court for correctness and are accorded no particular deference. Smith v. Smith, 793 P.2d 407, 409 (Utah App. 1990).

DETERMINATIVE LAW

Utah Code Annotated § 78-14-4 of the Utah Healthcare Malpractice Act. (Attached as Addendum "A").

STATEMENT OF THE CASE

This is a medical malpractice action arising from the performance of the second of three stages of ileoanal anastomosis surgery on plaintiff G. Kevin Jones by James M. Becker, M.D. ("Dr. Becker") on February 27, 1984. (R. at 2-10). At the time of the procedure, and at all other relevant times, Dr. Becker was a full time employee and faculty member in the Department of Surgery at the University of Utah Medical Center. (R. at 463-464). All surgeries and treatment performed and rendered by defendants were provided at the University of Utah Medical Center.

Plaintiff's Notice of Intent to Commence Action was served on December 4, 1987. (R. at 3). A request for prelitigation review was filed by plaintiff on January 15, 1988. (R. at 3). This action was commenced April 26, 1988. (R. at 2-10). After significant discovery, this matter was tried to the trial court, without a jury, on November 12, 13 and 25, 1991. In accordance with § 78-12-47, UCA (1953 as amended) the trial was bifurcated and

limited to the issues pertaining to defendants' statute of limitations defense. (R. at 976).

The trial Court's Decision following the statute of limitations trial was rendered on December 18, 1991. (R. at 1046-1054; Attached as Addendum "B"). Findings of Fact and Conclusions of Law were entered by the trial court on January 23, 1992. (R. at 1083-1089; Attached as Addendum "C"). After hearing the arguments and evidence presented by both parties, and reviewing the trial briefs submitted by the parties, the trial court dismissed plaintiff's action due to the fact that it was not commenced within the time required by § 78-14-4. (R. at 1083-1089). The trial court found that plaintiff's action was time barred because it was not commenced within two years after he knew and reasonably should have known of his alleged injuries and that he might have a cause of action against defendants. (R. at 1083-1089).

STATEMENT OF FACTS

1. In 1977 plaintiff graduated from law school and commenced employment as a lawyer with the federal government in Alaska. (R. at 848).

2. During 1980, while in Alaska, plaintiff began experiencing gastrointestinal problems. He consulted a physician in Alaska and was treated with Azulfadine. (R. at 848).

3. In November 1980 plaintiff moved to Utah. In Utah his gastrointestinal problems persisted and he consulted Dr. J. P. Hughes, a gastrointestinal surgeon, Dr. Lynn L. Wilcox, a gastroenterologist, and subsequently Dr. Clifford G. Harman, a

gastroenterologist. Dr. Harman has treated plaintiff from 1981 to the present. (R. at 848).

4. In 1981 Dr. Hughes, Dr. Wilcox and Dr. Harman diagnosed plaintiff's condition as chronic ulcerative colitis. Dr. Harman treated plaintiff medically with a drug called Azulfadine and Prednisone, a steroid. (R. at 848, 1083a).

5. Ulcerative colitis is a serious, potentially life threatening, inflammatory bowel disease. The cause of the disease is unknown. The standard medical therapy is Azulfadine, steroids and a regulated diet. (R. at 848).

6. If the disease is not controlled by the standard medical therapies, surgery is necessary. Ulcerative colitis affects and is limited to the mucosal lining of the colon and rectum. Traditionally, the surgical treatment was removal of the colon and rectum and creation of an abdominal stoma and ileostomy. The retained small bowel was attached to the abdominal wall and emptied into a bag worn externally by the patient. (R. at 848-849).

7. In the early 1980s a new and promising surgical procedure was available for ulcerative colitis patients. This procedure, generally known as an ileoanal anastomosis or ileoanal pull through procedure involves the standard colectomy (removal of the colon), but only the mucosal lining of the rectum is removed, thus preserving the rectal muscle and anal sphincter function. A pouch (generally a "J" pouch) is created in the distal end of the small bowel and the bowel is connected to the rectum. (R. at 849).

8. The above procedure is generally performed in two or three steps, requiring a temporary ileostomy. The obvious

advantages of this procedure over the traditional colectomy, proctectomy and ileostomy are (1) the patient does not permanently require an external appliance or bag and (2) the anal sphincter function and some degree of continence is maintained. (R. at 849).

9. With the new procedure, the surgical risk of damage to nerves controlling sexual function is theoretically decreased because the surgery in the rectal area is performed inside the rectum with the rectal muscle between the nerves and the operative site. However, sexual dysfunction has been reported following the procedure, but less often than with the traditional proctectomy. (R. at 849).

10. In approximately 1982 plaintiff became aware of the ileoanal anastomosis procedure and that Dr. James Becker was performing this new procedure at the University of Utah. (R. at 849-850).

11. In November 1982 plaintiff consulted Dr. Becker at the University of Utah School of Medicine concerning surgical options for his ulcerative colitis, including specifically the ileoanal anastomosis procedure. (R. at 850, 1083a).

12. Around Christmas time in 1982 or during the summer of 1983 plaintiff's mother and father came from Alaska to Utah and visited with Dr. Becker concerning surgical options for treating plaintiff's ulcerative colitis and specifically concerning the ileoanal anastomosis procedure. (R. at 850, 1083a).

13. In October 1983 plaintiff visited Dr. Kenneth Huizenga, a gastroenterologist at the Mayo Clinic in Rochester, Minnesota. Dr. Huizenga confirmed plaintiff's diagnosis of chronic ulcerative

colitis and plaintiff was accepted into a study protocol for investigation of a new drug (5ASA) for the treatment of ulcerative colitis. (R. at 850, 1083a).

14. Plaintiff's disease did not respond favorably to the 5ASA therapy and Dr. Huizenga had no other medical treatment to offer. He arranged, however, a surgical consult for plaintiff with a colorectal surgeon at Mayo Clinic. Plaintiff met with Dr. Roger Dozois who explained the surgical options to him, including the ileoanal anastomosis. (R. at 850, 1083a).

15. In December 1983 plaintiff's ulcerative colitis could no longer be controlled by medical therapy and became so severe that he was admitted to Holy Cross Hospital by his treating gastroenterologist, Dr. Clifford Harman. In the opinion of Dr. Harman, medical therapies had been exhausted and surgery was necessary to save plaintiff's life. Dr. Harman recommended transfer to the University Hospital for surgery. (R. at 850, 1083a).

16. In January 1984 plaintiff and his parents discussed the surgical options with Dr. Becker. Plaintiff elected to undergo the ileoanal anastomosis procedure after having been informed concerning the risks and benefits of that procedure and of the alternative procedures. (R. at 851, 1048-1049, 1083a-1084, 1201-1202, 1204, 1209-1210, 1224).

17. Dr. Becker advised plaintiff that the risk of sexual dysfunction was lower with the ileoanal anastomosis procedure than with the alternative procedures, but that sexual dysfunction was a

risk of the procedure. (R. at 1048-1049, 1084, 1201-1202, 1204, 1224).

18. In January 1984 Dr. Becker recommended performing the ileoanal anastomosis procedure in three steps because plaintiff was so ill. (R. at 851, 1084).

19. On January 5, 1984, the first phase of the ileoanal anastomosis, removal of most of the colon and the creation of a temporary ileostomy, was performed by Dr. Becker on plaintiff. (R. at 851, 1084).

20. The first phase of the procedure was completed without complications. Following completion of the first phase and prior to the second phase of the procedure, plaintiff claims he masturbated to test his sexual function. At that time he felt relieved and stated "at least I got through that one okay", referring to the first surgery. (R. at 1049-1050, 1084).

21. On February 27, 1984, plaintiff underwent the second phase of the ileoanal anastomosis procedure, the mucosal proctectomy or removal of the mucosal lining from the rectum. Again, prior to this procedure the risks were explained to plaintiff by Dr. Becker, including the risk of sexual dysfunction. (R. at 851, 1084, 1224).

22. In April or May 1984 plaintiff discovered what he perceived to be sexual dysfunction, including lack of ejaculation and diminished frequency and quality of erections. (R. at 851, 923-929, 1047-1050, 1084, 1731, 1864-1869).

23. In May 1984 plaintiff reported his perceived sexual dysfunction to his parents and to Dr. Becker. At that time he

reported to Dr. Becker that he had been told by his family doctor that he might be impotent, secondary to his surgery. (R. at 882, 923-929, 1047, 1085, 1152-1153, 1731, 1864-1869).

24. In May 1984 Dr. Becker referred plaintiff to Dr. Middleton, a urologist, and to Dr. Hammond, a psychologist and sex therapist, to explore the reported sexual dysfunction. (R. at 953-957, 1050, 1085, 1731, 1870-1873).

25. Since April or May 1984, plaintiff has had ill defined sexual dysfunction, the cause of which has not been definitively determined. (R. at 1048, 1085).

26. Beginning in May 1984, in discussions and correspondence with various physicians, plaintiff repeatedly causally related his perceived sexual dysfunction to his second operative procedure performed in February 1984. (R. at 1085).

27. During the years 1984 and 1985 plaintiff considered suing defendants for medical malpractice based on his perceived sexual dysfunction and general dissatisfaction with the outcome of his surgeries. (R. at 905-906, 1052, 1086, 1319-1320, 1552, 1580-1582).

28. On June 28, 1984 the third and final phase of the ileoanal anastomosis was performed (attachment of the small bowel to the rectum) and completed. (R. at 851, 1086).

29. All surgeries and treatment performed and rendered by Defendants were provided at the University of Utah Medical Center. (R. at 851, 1086).

30. Within the State of Utah, this surgical procedure was available for adult patients only at the University Hospital and

Dr. Becker was the only physician in the state performing the procedure at the time plaintiff underwent his surgery. (R. at 851).

31. Dr. Becker was at all times relevant hereto a full time employee and faculty member in the Department of Surgery at the University of Utah Medical Center. (R. at 463-464, 1086).

32. Plaintiff's Notice of Intent to Commence Action was served on December 4, 1987. (R. at 3).

33. A request for prelitigation review was filed by plaintiff on January 15, 1988. (R. at 3).

34. This action was commenced on April 26, 1988. (R. at 2-10).

35. After significant discovery, this matter was tried to the trial court, without a jury, on November 12, 13 and 25, 1991. In accordance with § 78-12-47, UCA (1953 as amended) the trial was limited to the issues pertaining to defendants' statute of limitations defense. (R. at 976).

36. The trial court's Findings of Fact and Conclusions of Law, dismissing plaintiff's claim, were entered on January 23, 1992. (R. at 1083-1089).

SUMMARY OF ARGUMENTS

1. Plaintiff has failed to meet his burden in his brief of marshalling all of the relevant evidence presented at trial which supports the trial court's Findings of Fact and demonstrating that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence.

Instead, plaintiff has set forth those facts and testimony which he believes support his view of the facts and argues that there is evidence contradicting the trial court's Findings. When an appellant fails to meet this burden, the trial court's findings are accepted as valid. Thus, the trial court's Findings of Fact in this instance should be affirmed.

2. The trial court's findings of fact, specifically those challenged by plaintiff, are valid and supported by the evidence and should be affirmed. The trial court's factual findings should be given considerable deference because of the trial court's ability to assess the witnesses credibility.

The evidence established that plaintiff did not accept or rely upon any other theories of causation of his perceived problems. Moreover, plaintiff presented no evidence that he was ever misled or deceived about the cause of his problems. In fact, the evidence establishes that plaintiff believed that his problems were caused by his surgery and considered suing defendants during 1984 and 1985 for medical malpractice based on his perceived sexual dysfunction.

Plaintiff does not challenge the trial court's finding that since May 1984, in discussions and correspondence with various physicians, he repeatedly causally related his perceived sexual dysfunction to the second operative procedure performed in February 1984. He also does not challenge the finding that in May 1984 he reported his perceived sexual dysfunction to his parents and Dr. Becker, and that he reported to Dr. Becker that he had been told by his family doctor that he might be impotent, secondary to his surgery. In light of these admitted facts, plaintiff's later claim

that he had no knowledge that his dysfunction was caused by the operation of February 1984 is without merit.

There were numerous exhibits introduced into evidence at the trial of this matter which established that beginning in May 1984, and continuing thereafter, plaintiff knew and reasonably should have known that his second surgery in February 1984 was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants. Plaintiff has completely failed to address this evidence in his brief.

Although plaintiff alleges that he did not discover his injury until his visit with Dr. Merrill Dayton on September 15, 1987, there is absolutely no evidence that he became aware of any information at this time that he did not already know in 1984 and 1985.

3. The trial court's interpretation of U.C.A. § 78-14-4 was based on recent cases decided by this Court, the Utah Supreme Court and the United States District Court for the District of Utah and was correct. The trial court correctly held that knowledge of an injury for purposes of the statute of limitations does not require an expert opinion confirming malpractice. In the absence of such a holding, the statute would be tolled in every case until a plaintiff not only decided to seek, but found favorable expert medical testimony.

The trial court also correctly found that discovery of an injury occurs when a plaintiff knows or should have known that he might have a cause of action, and that plaintiff in this instance

discovered "the injury" and made the causal connection between his problem and the surgery in April or May of 1984.

In his brief, plaintiff relies primarily on the case of Foil v. Ballinger, 601 P.2d 144 (Utah 1979) for his interpretation of U.C.A. § 78-14-4. However, plaintiff's reliance is misplaced due to decisions subsequent to Foil clarifying and further interpreting § 78-14-4. In fact, plaintiff recognizes in his brief that Foil is no longer followed as precedent but essentially argues that the reasoning and analysis applied by the Utah Appellate Courts in every case decided since Foil is flawed and incorrect.

The evidence presented at trial also established that plaintiff was fully aware of the nature, extent, severity and permanence of his perceived injuries. Nevertheless, the Utah Courts have specifically addressed this issue and held that a plaintiff need not know of the full nature, extent, severity and permanence of an injury for the statute to begin running. A plaintiff need only know he is suffering a disorder to begin the running of the statute of limitations, and need not know the extent of his injury, the actual malady suffered, or whether the injury is temporary or permanent.

Plaintiff's claim that he must also know that his injury was the result of negligence is without merit. This is not the law with regard to § 78-14-4 and a requirement such as this would lead to absurd results. In essence, a legal determination of negligence would be required before the statute of limitations would run. This is contrary to the purpose behind the enactment of § 78-14-4.

4. The trial court's decision that the continuing treatment doctrine was inconsistent with § 78-14-4 and not applicable in Utah is correct. The "continuing treatment" doctrine has been adopted by some jurisdictions as a judicial doctrine to avoid the harsh result of a plaintiff's claim being barred before a plaintiff knows that there is a claim. The basis for the doctrine is to avoid those situations where discovery is delayed because of a continuing doctor/patient relationship. However, states which have adopted a discovery of injury statute of limitations for medical malpractice actions analogous to that adopted in Utah have rejected the continuous treatment doctrine as obsolete.

The continuing treatment doctrine serves no purpose in Utah with the passage of § 78-14-4 and its two year discovery of injury provision; four year statute of repose; foreign object exception; and fraudulent concealment exception.

5. The trial court's decision that the continuing treatment doctrine was not applicable, even in the absence of § 78-14-4, was correct. There was abundant evidence establishing that plaintiff had sufficient knowledge of his injury to commence the running of the statute of limitations as early as May 1984. The doctrine was not developed to toll the statute of limitations when a plaintiff knows he has a cause of action. Further, the trial court correctly found that plaintiff was not misled or prevented from discovering information about his alleged injuries as a result of any continuous course of medical treatment.

One of the primary purposes for the continuing treatment doctrine is for a situation where no single incident in a

continuous chain of negligence can be identified as the cause of the harm. In such a situation, the doctrine is applied to prevent injustice. The continuing treatment doctrine would not serve such a purpose in this instance. Plaintiff himself contends the claims in this case result from one specific incident, the second surgery on February 27, 1984.

6. The record before the court establishes that the trial court made its Findings of Fact and Conclusions of Law after a careful consideration of the evidence. Plaintiff's appeal from the trial court's decision is not grounded in fact, not warranted by existing law, and not based on a good faith argument to extend, modify, or reverse existing law. Rather, plaintiff's claims on appeal simply controvert the findings of the court. Thus, plaintiff's appeal is frivolous and defendant is entitled to the benefit of U.R.C.P., Rule 33(a).

ARGUMENT

POINT I

PLAINTIFF HAS FAILED TO MEET HIS BURDEN OF MARSHALLING THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS OF FACT AND DEMONSTRATING WHY THE TRIAL COURT'S FINDINGS ARE LACKING IN SUPPORT. THUS, THE TRIAL COURT'S FINDINGS SHOULD BE ACCEPTED AS VALID AND AFFIRMED.

It is plaintiff's burden in his brief to marshall all of the relevant evidence presented at trial which tends to support the trial court's Findings of Fact and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence. When an

appellant fails to meet this burden, the trial court's findings are accepted as valid. Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990). This Court has previously stated that this threshold burden is neither elective nor optional. Fitzgerald v. Critchfield, 744 P.2d 301, 304 (Utah App. 1987). This Court has also held the following:

This burden is a heavy one, reflective of the fact that we do not sit to retry cases submitted on disputed facts. (citation omitted). Accordingly, when an appellant fails to carry its burden of marshalling the evidence, we refuse to consider the merits of challenges to the findings and accept the findings as valid. (citation omitted).

Saunders v. Sharp, 793 P.2d 927, 931 (Utah App. 1990).

Plaintiff has completely failed to meet his burden of marshalling the evidence. The trial brief which defendants submitted to the trial court contained 14 exhibits in support of the position that plaintiff's claim was barred by the statute of limitations, as well as 8 additional exhibits of deposition excerpts. (R. at 846-965). At the trial of this matter, defendants introduced 19 exhibits into evidence, as well as introducing deposition and live testimony. (R. at 1019). As reflected in the Trial Court's Decision, dated December 18, 1991, the court relied on defendant's exhibits and the proffered testimony in reaching its' decision. (R. at 1046-1054; See Addendum "B").

In his brief, plaintiff has failed to marshal and address the aforementioned evidence submitted by defendants to the trial court. Instead, he has set forth those facts and testimony which he believes support his view of the facts and argues that there is

evidence contradicting the trial court's Findings. In fact, the majority of the evidence set forth in his brief is his own testimony, the credibility of which the trial court, and not this court, was obligated and permitted to assess.

Because of his failure to properly marshall the evidence, plaintiff has failed to demonstrate that the trial court's Findings are against the clear weight of the evidence. This Court has "shown no reluctance to affirm when the appellant fails to adequately marshall the evidence". West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1313 (Utah App. 1991). The same result is warranted in this instance. Thus, the trial court's Findings of Fact must be accepted as valid and should be affirmed.

POINT II

THE TRIAL COURT'S FINDINGS OF FACT ARE
SUPPORTED BY THE EVIDENCE AND SHOULD BE
AFFIRMED.

As mentioned above, plaintiff has failed to carry his burden of marshalling the evidence. Because of this failure, the merits of plaintiff's challenges to the trial court's Findings should not be considered by this Court and the trial court's Findings should be accepted as valid. However, for argument purposes and without intending to waive the position stated under Point I above, defendants will address plaintiff's specific challenges to the trial court's Findings of Fact and set forth the evidence supporting each finding.

A. Findings of Fact 5, 6 and 10.

Plaintiff's first challenge is to Findings of Fact numbered 5, 6 and 10. These findings essentially state that plaintiff was fully informed of the risks and benefits of his surgery prior to undergoing the procedure, including the fact that sexual dysfunction was a risk of the procedure.

Although plaintiff denies that he was informed of the risk of sexual dysfunction, the trial court, in the Court's Decision of December 18, 1991, held that this denial was not credible in view of the totality of the testimony, including plaintiff's own testimony that he considered and requested that his sperm be banked prior to the surgery. (R. at 1051). In particular, the trial court held that plaintiff's articulated desire to have his sperm banked would not have been made but for his knowledge of the risk of sexual dysfunction. (R. at 1049).

The trial court further noted that it considered plaintiff's demeanor and testimony, and found that his demeanor, attitude and the content of his answers revealed him to be an intelligent, careful man with a great attention to detail. The trial court also recognized that plaintiff was a lawyer and understood the concept of informed consent. (R. at 1049).

Findings of Fact 5, 6 and 10 are supported by the testimony presented to the trial court from Dr. Becker. This testimony established that Dr. Becker informed plaintiff of the risks of the surgery, including the risk of sexual dysfunction, and that plaintiff knew of this possibility before surgery. (R. at 1201-1202, 1204, 1224). Evidence was also presented to the trial court

establishing that plaintiff had access to, and read, a pamphlet from the Mayo clinic regarding the ileoanal anastomosis procedure. (R. at 1341-1342). This pamphlet stated that sexual dysfunction was a risk of the procedure.

Plaintiff asserts in his brief that the issue of what plaintiff was informed of prior to trial is irrelevant. However, this issue was raised by plaintiff and is clearly relevant to when plaintiff became aware that his sexual dysfunction could have been caused by the surgery. Plaintiff's knowledge prior to his surgery is particularly relevant in light of plaintiff's continued representations that he had no reason to believe that his surgery could result in sexual dysfunction problems. Accordingly, the trial court's findings of fact numbered 5, 6 and 10 are supported by the evidence and should be affirmed.

B. Findings of Fact 16 and 26.

Plaintiff also challenges Findings of Fact 16 and 26. These two Findings will be addressed together due to there similarity and because of the common evidence supporting them.

Finding of Fact 16 states that beginning in May 1984, and continuing thereafter, plaintiff knew and reasonably should have known that his second surgery in February was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants. Finding of Fact 26 states that plaintiff's action was not commenced within two years after he knew and reasonably should have known of his perceived sexual dysfunction and general dissatisfaction with the outcome of his

surgeries and that he might have a claim for malpractice against defendants.

Plaintiff's challenge to these two Findings is based on his own testimony and his assertion that there is no evidence in the record supporting them. However, plaintiff completely ignores the abundant evidence presented to the trial court supporting Findings of Fact 16 and 26.

The complaint in this matter was filed by plaintiff on April 26, 1988. (R. at 2-10). A request for prelitigation review, which tolls the statute of limitations, was filed by plaintiff on January 15, 1988. (R. at 3). The statute of limitations for medical malpractice actions is two years from the date the plaintiff discovers or should have discovered the injury. Therefore, if plaintiff discovered or should have discovered his injury prior to January 15, 1986 his case is time barred.

In his brief, plaintiff states that he denied any knowledge that his dysfunction was caused by the operation of February 1984. (See Brief of Appellant, P. 13). He further alleges that he did not report his dysfunction problems to Dr. Becker because of any belief that they were caused by the surgery. Not only is there abundant evidence refuting plaintiff's denials, but these denials are particularly interesting in light of the fact that in his brief plaintiff has not challenged the trial court's Findings of Fact 12 and 14.

Finding of Fact 14 states that since May 1984, in discussions and correspondence with various physicians, plaintiff repeatedly causally related his perceived sexual dysfunction to the second

operative procedure performed in February 1984. Further, Finding of Fact 12 states that in May 1984 plaintiff reported his perceived sexual dysfunction to his parents and Dr. Becker, and that he reported to Dr. Becker that he had been told by his family doctor that he might be impotent, secondary to his surgery. In light of these accepted facts, plaintiff's denial that he had any knowledge that his dysfunction was caused by the operation of February 1984 is unacceptable.

The evidence overwhelmingly shows that plaintiff had knowledge of his "injury" as early as May 1984. There were numerous exhibits and abundant testimony introduced into evidence at the trial of this matter which established that plaintiff knew and reasonably should have known as early as 1984 that his second surgery in February 1984 was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants. Plaintiff has completely failed to address this evidence in his brief. The following is a list of exhibits and evidence introduced at trial which support the trial court's Findings of Fact 16 and 26:

Defendants Trial Exhibit-1; Plaintiff Trial Exhibit-4; In the interim the patient now also complains of possible impotence. This patient is a very anxious young man and is concerned about his sexual function. . . . He states that he is concerned about impotence because prior to his surgery he had regular nocturnal erections and emissions. Since his second operation he states the frequency of these events has decreased. He was told by his family doctor that he might be impotent secondary to his surgery. (Excerpts from May 29, 1984 letter from Dr. James Becker to Dr. Richard Middleton). (R. at 882, 1152-1153, 1274).

Defendants Trial Exhibit-3; In August 1984, plaintiff reports to Dr. Urry on his medical history form that his

sexual dysfunction problems were the result of his colon surgeries. (Deposition excerpts of Dr. Ronald L. Urry). (R. at 943-946, 2088, 2108-2110, 2112).

Defendants Trial Exhibit-4; My basic problem is the result of my colon surgeries. I have had three surgeries for colitis: (1) partial removal of the colon Jan. 1984; (2) pull-through Feb. 1984; and (3) take down in June 1984. I noticed a marked difference in my sexual arousal after the second surgery. Diminished ability to achieve an erection, no real orgasm, and no sperm ejaculate. (Mr. Jones also reports that he was able to obtain an erection easily before his surgery but not now, that he did have erections in the morning before his surgery but not now and that he was aware of his erections in the night before his surgery but not now.) (Medical History Form filled out by plaintiff, Fertility Evaluation Clinic, Division of Urology, University of Utah Medical Center, Dr. Ronald Urry, May 31, 1984). (R. at 884-887, 1283-1284).

Defendants Trial Exhibit-6; As you know, the patient complained of impotence since February. . . . He indicated that by late February he sensed a "deadening" and lack of nocturnal emissions. (Excerpts from letter from D. Corydon Hammond, Ph.D. to James M. Becker, M.D. June 15, 1984). (R. at 889, 1523).

Defendants Trial Exhibit-7; Patient has apparently been told that or came to the conclusion that the procedure has not been successful. (Records from the University of Utah Medical Center; Psychiatric consultation progress note; Dr. Richard Segal; July 2, 1984). (R. at 893-894, 1523).

Defendants Trial Exhibit-10; I am a thirty-three year old male who has experienced sexual dysfunction problems following a pull-through procedure for chronic ulcerative colitis. . . . Specifically, I have a diminished ability to achieve an erection and more importantly no emission/ejaculation function. (Excerpts from letter from G. Kevin Jones to Dr. David Barrett, Mayo Clinic); (This letter is not dated but is prior to January 15, 1985, based on the return letter from Dr. Barrett thanking Mr. Jones for his recent letter with regard to his problem with ejaculation following surgery for colitis). (R. at 899, 1285).

Defendants Trial Exhibit-11; Since his second operation 2/84 he has had very few erections, several which were adequate for penetration but not as strong as prior to 2/84. (Records from University of Chicago Hospital and

Clinic; Urology Consultation; Dr. Franklin L. Smith; March 28, 1985). (R. at 902, 1289-1291).

Defendants Trial Exhibit-13; Kevin's main problem at this point, as you know, is sterility. . . . He is convinced that the problem is not psychological and was told this by a psychiatrist in Chicago. Another physician (urologist) told him that he thought the "cord had been cut". (Dr. James Becker's office records; Terri Stoker, patient advocate for Dr. Becker, July 23, 1985). (R. at 905-906, 1297-1299).

Defendants Trial Exhibit-15; Mr. Jones has asked that I write you regarding my findings and recommendations regarding his genitourinary system. . . . Since his second rectal surgical procedure, he has decreasing ability to get penile erection. He also has had failure of ejaculation. . . . The sensation of orgasm also has markedly decreased since his rectal surgery of March in 1984. He is able to get an erection but it is not as large or as hard as it was before surgery. . . . I had a long discussion with him regarding his failure of seminal emission and ejaculation and have told him that I would not advise that he pursue any claims to do nerve repair in this area because it is likely to make him worse and possibly make him lose his erection mechanism totally. . . . I have explained to him that the expected by product of his colon surgery to save his life is the unfortunate loss of his ejaculatory mechanism. (Excerpts from September 4, 1985 letter from Dr. Ned Mangelson to Dr. Clifford Harman; this information is also found in the Salt Lake Clinic, Department of Urology, Office Notes of Dr. Ned Mangelson, August 29, 1985). (R. at 913, 915-916, 1291-1294, 1308-1309, 1321).

Defendants Trial Exhibit-15; Orgasm: Markedly decreased since rectal surgery of March of 1984. Impotence: No more nocturnal erections. Is able to get erections but not as hard or large as before surgery. Work up & Disposition: Discussed advisability of marrying as desired at appropriate time and if erections insufficient consider prosthesis. (Salt Lake Clinic, Department of Urology, History and Physical by Dr. Ned Mangelson, August 8, 1985). (R. at 908-911, 1291-1294).

Defendants Trial Exhibit-16; Enclosed is a letter to my primary care physician, Dr. Harman, from a Salt Lake urologist that describes the sexual dysfunction problems that I have experienced since I underwent multiple surgical procedures. . . . The surgeries have left me with a diminished ability to achieve an erection and no ejaculation. . . . It has been his opinion (Dr. Becker's) that the problem is psychological but I know this is not

the case. Immediately after the pull-through, I noticed the problem and it is nearly two years since the problem developed (March 1983 date of surgery). (Excerpts from September 30, 1985 letter from G. Kevin Jones to Dr. Roger Dozois, Mayo Clinic). (R. at 918, 1306-1308, 1322-1324).

Plaintiff's reports to physicians and health care providers in 1984 and 1985 clearly establish that plaintiff knew and reasonably should have known that his second surgery in February 1984 was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants. Moreover, plaintiff's claim that he did not discover his injury prior to 1987 is particularly inconceivable when reviewing the letters plaintiff himself wrote. The only plausible conclusion from these letters is that plaintiff had made the connection between his surgeries and his symptoms in 1984.

Plaintiff's letter of September 30, 1985, to Dr. Dozois at the Mayo Clinic, clearly states that plaintiff attributed his sexual dysfunction problems to his surgeries. In fact, plaintiff states in the letter that he noticed the problem immediately after his surgery in March of 1983 (this should be 1984) and that he knew that the problem was not psychological. (R. at 918, 1306-1308, 1322-1324). In addition, plaintiff's letter to Dr. Barrett at the Mayo Clinic also indicates that plaintiff attributed his sexual dysfunction problems to his surgery in 1984. (R. at 899, 1285).

Along with the numerous references from the medical records mentioned above, there was also deposition and live testimony presented to the trial court further establishing and supporting

the fact that plaintiff had knowledge of his injury over two years prior to filing his action.

In fact, plaintiff admitted in his testimony before the trial court that he expressed the concern to Dr. Mangelson in August 1985 that his surgery had caused his sexual dysfunction problems. (R. at 1303-1304). Dr. Mangelson confirmed this in his deposition. (R. at 1285). Plaintiff also testified in his deposition, taken November 28, 1990, that he first became concerned about his sexual dysfunction problems sometime between his second and third surgeries (between March 1984 and June 1984). (R. at 923-929, 1731, 1864-1869). He raised these concerns to his mother and to a resident or intern at the University, who passed the information on to Dr. Becker. (R. at 923-929, 1731, 1864-1869).

Dr. Corydon Hammond also testified in his deposition that he first saw plaintiff on June 11, 1984 and that plaintiff complained at that time of not being able to obtain erections since his surgery in February 1984. (R. at 939-941, 1525). Additionally, the deposition testimony of Dr. Franklin Smith, a urologist at the University of Chicago Hospital and Clinic, establishes that in early 1985 plaintiff reported sexual problems starting "after the second operation in February 1984." (R. at 1289-1291, 1541). Plaintiff testified before the trial court that at the time he saw Dr. Smith in early 1985 he was seeking an answer to the question of whether his sexual dysfunction was caused by the surgery. (R. at 1485-1486).

Finally, Dr. Clifford Harman, a gastroenterologist who regularly treated plaintiff, testified in his deposition that

plaintiff clearly felt that his problems were related to something that had gone wrong with the surgery and that plaintiff had reported this concern to him as early as December 1984. (R. at 1914, 2010-2011, 1311-1314).

Each of the above references to medical records or testimony would be sufficient evidence on its own to establish that plaintiff made the connection between his surgeries and his symptoms and knew he may have a cause of action against a health care provider as early as May 1984. When considering the aforementioned references in total, plaintiff's claim that he did not discover his injury prior to September 1987 is inconceivable. The only conceivable interpretation from the numerous entries above is that plaintiff was attributing his sexual dysfunction problems to his surgery, and had come to this conclusion as early as 1984.

Although plaintiff alleges that he did not discover his injury until his visit with Dr. Merrill Dayton on September 15, 1987, there is absolutely no evidence that he became aware of any information at this time that he did not already know in 1984 and 1985. In fact, Dr. Dayton testified before the trial court that he did not tell plaintiff that a complication from his surgery was the most likely cause of his sexual dysfunction. (R. at 1173).

It is clear from the abundant evidence presented to the trial court that plaintiff knew and reasonably should have known as early as 1984 that his second surgery in February 1984 was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants. Since plaintiff's action was not commenced within two years after he obtained such knowledge,

his claim was appropriately dismissed by the trial court. Accordingly, the trial court's Findings of Fact 16 and 26 are adequately supported by the evidence and should be affirmed.

C. Finding of Fact 17.

Finding of Fact 17 states that "plaintiff did not accept or rely upon any other theories of causation suggested by defendants or any other physicians. Specifically, plaintiff rejected and did not rely upon any suggestion that there may be a psychological cause of his perceived sexual dysfunction." Plaintiff's challenge to this finding is primarily his own testimony that he followed the advise of Dr. Becker and sought additional treatment based on Dr. Becker's representation that plaintiff's problem was psychological. (See Brief of Appellant, p. 14). However, the clear and abundant evidence presented to the trial court indicates otherwise.

To begin with, plaintiff's challenge to Finding 17 is also interesting (as was his challenge to Findings 16 and 26 above) in light of the fact that he has not challenged Finding of Fact 14; which states that since May 1984, in discussions and correspondence with various physicians, plaintiff repeatedly causally related his perceived sexual dysfunction to the second operative procedure performed in February 1984. Further, the evidence presented above concerning Findings 16 and 26 clearly establishes that as early as May 1984 plaintiff attributed the cause of his problems to his surgery in February 1984. It is clear from this evidence that plaintiff did not accept or rely upon any other theories of causation.

The evidence supporting Finding 17 includes a July 23, 1985 memorandum from Terri Stoker, patient advocate for Dr. Becker, which stated that plaintiff's main problem at the time was sterility and that plaintiff was "convinced that the problem is not psychological and was told this by a psychiatrist in Chicago." (R. at 905-906, 1297-1299, 1323-1324). Further, plaintiff recorded the very same thought in a letter that he wrote on September 30, 1985 to Dr. Roger Dozois at the Mayo Clinic in Rochester, Minnesota:

Enclosed is a letter to my primary care physician, Dr. Harman, from a Salt Lake urologist that describes the sexual dysfunction problems that I have experienced since I underwent multiple surgical procedures. . . . The surgeries have left me with a diminished ability to achieve an erection and no ejaculation. . . . It has been his opinion (Dr. Becker's) that the problem is psychological but I know this is not the case. (emphasis added). Immediately after the pull-through, I noticed the problem and it is nearly two years since the problem developed (March 1983 date of surgery)." (R. at 918, 1306-1308, 1322-1324).

Plaintiff also testified that he found Dr. Corydon Hammond's explanation, of a possible psychological cause for the dysfunction, incredible and "unsatisfactory" and never believed this to be the cause. (R. at 1472). Moreover, the fact that plaintiff failed to pursue further psychological treatment despite recommendations that he should makes it clear that he did not believe his problem to be psychological. (R. at 415-417, 1333). Accordingly, Finding of Fact 17 is clearly supported by the evidence and should be affirmed.

D. Findings of Fact 18 and 19.

Findings of Fact 18 and 19 state that Jones was not misled or deceived concerning the possible causes of his perceived sexual

dysfunction and that defendants did not fraudulently represent or conceal any information relevant to plaintiff's treatment, recovery or perceived sexual dysfunction. In support of his challenge to these findings, plaintiff states that Dr. Becker discounted any possibility that the surgery was the cause of his dysfunction, that defendants never told him that the surgery caused permanent sexual dysfunction and that defendants denied any causation between the surgery and plaintiff's problems. Even if the trial court assumed these assertions to be true, plaintiff does not present any evidence of misrepresentation, deception or fraudulent concealment on the part of defendants.

Although plaintiff argues that he was never told that the surgery caused permanent sexual dysfunction and that defendants denied any causation between the surgery and plaintiff's problems, he states later in his brief that "the record demonstrates that Becker really didn't know whether Jones' sexual dysfunctions were in any way related to the surgery". (See Brief of Appellant, p. 33). He also notes that Dr. Becker is still uncertain of the cause of plaintiff's problems, was not certain if plaintiff had a sexual dysfunction problem at all, and also characterized plaintiff's problems as "ill-defined". (See Brief of Appellant, p. 25, 33). It is incongruous for plaintiff to claim on the one hand that he was misled by defendants as to the cause of his problems and then later admit that defendants were, and still are, uncertain as to what that cause is.

As the trial court appropriately noted, plaintiff presented no evidence at trial that he was ever misled or deceived about the

cause of his problems. (R. at 1722). In fact, the abundant evidence presented clearly establishes that plaintiff believed that his problems were caused by his surgery. As previously noted, the trial court record is replete with evidence that since May 1984, in discussions and correspondence with various physicians, plaintiff repeatedly causally related his perceived sexual dysfunction to his second surgery in February 1984.

Moreover, plaintiff admits in his own deposition that Dr. Becker referred him to Dr. Hammond, a psychologist/sex therapist, and Dr. Middleton, a urologist, for the express purpose of helping him with his complaints of urological and sexual problems. (R. at 953-957, 1731, 1870-1873). Plaintiff had his first visit to Dr. Hammond on June 11, 1984, and his first visit to Dr. Middleton on May 31, 1984. In addition, Dr. Becker referred plaintiff to Dr. Joel Bauer, a colorectal surgeon in New York. Plaintiff also admits in his deposition that the purpose of this referral was because Dr. Bauer specialized in working with sexual dysfunction problems. (R. at 959-961, 965, 2188, 2225-2226).

If Dr. Becker were trying to mislead plaintiff as to the cause of his alleged problems, he certainly would not be referring him to specialists to help him with his complaints. Accordingly, Findings of Fact 18 and 19 are supported by the evidence and should be affirmed.

E. Finding of Fact 20.

Finding of Fact 20 states that during 1984 and 1985 plaintiff considered suing defendants for medical malpractice based on his perceived sexual dysfunction and general dissatisfaction with the

outcome of his surgeries. This finding is supported by the testimony of Terri Stoker and her memorandum of July 23, 1985, which she prepared while working as a patient advocate for Dr. Becker. (R. at 905-906, 1319-1320, 1552, 1580-1582). In her memorandum and testimony she states that plaintiff told her that he "contemplated suing" (defendants) repeatedly and that plaintiff's threats of a lawsuit were made as early as 1985. (R. at 905-906, 1552, 1580-1582). Accordingly, Finding 20 is supported by the evidence and should be affirmed.

POINT III

THE TRIAL COURTS CONCLUSIONS OF LAW ARE CORRECT. THUS, PLAINTIFF'S CLAIM IS TIME BARRED AND WAS PROPERLY DISMISSED BY THE TRIAL COURT.

A. The trial court's interpretation of U.C.A. § 78-14-4 was correct.

1. A plaintiff need not be aware of the full nature, extent and permanence of his injuries.

The statute of limitations for medical malpractice actions in Utah is contained in the Utah Health Care Malpractice Act, Utah Code Annotated § 78-14-4, which provides in pertinent part:

No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs,

The critical question concerning the interpretation of § 78-14-4, and the issue addressed in the majority of the cases, is what the phrase "discovery of injury" means. This issue was also addressed by the trial court in this instance.

The trial court's interpretation of U.C.A. § 78-14-4 in this instance, and of the phrase "discovery of injury", was based on recent case precedent from this court. The trial court noted in its Decision that it was clear from this Court's opinion in Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989) that knowledge of an injury does not require an expert opinion confirming malpractice. (R. at 1047). The trial court further found that discovery of an injury occurs when a plaintiff knows or should have known that he might have a cause of action, and that plaintiff discovered "the injury" and made the causal connection between his problem and the surgery in April or May of 1984. (R. at 1048).

Utah Courts, including this Court in Floyd v. Western Surgical Associates, 773 P.2d 401 (Utah App. 1989), have affirmed a trial court's grant of summary judgment in situations with evidence far less compelling than this instance. In Floyd, the trial court based its decision that plaintiff's case was time barred almost solely on the plaintiff's deposition testimony. In his deposition, plaintiff stated that he had informed one of his doctors over two years prior to his lawsuit that his problems were probably caused by surgery he received from his treating doctor (the defendant). Based on plaintiff's testimony, the trial court granted summary judgment for the defendant. This Court affirmed.

In Reiser v. Lohner, 641 P.2d 93 (Utah 1982), the Supreme Court upheld the trial court's grant of summary judgment based on a single affidavit. In Reiser, the evidence that the case was time barred consisted primarily of a single affidavit from plaintiff's husband in which he asserted a belief that his wife's disorders

were temporary and that he did not become aware of any permanent damage until later.

In his brief, plaintiff asserts that the trial court erred in its interpretation and application of U.C.A. § 78-14-4. Specifically, plaintiff alleges that the trial court improperly applied the requirements set forth in Foil v. Ballinger, 601 P.2d 144 (Utah 1979). (See Brief of Appellant, p. 17). Plaintiff asserts that one of the requirements under Foil is that a plaintiff understand the full nature, extent, severity and permanency of his condition. However, as this Court is aware, plaintiff's reliance on Foil is misplaced due to the decisions subsequent to Foil clarifying and further interpreting § 78-14-4.

In Foil, the plaintiff underwent surgery for back problems. Following surgery, the plaintiff was in a pain clinic and received a subarachnoid block, a block of anesthetic into the subarachnoid space in the spinal column. She then suffered symptoms of bladder and rectal problems which led to a total colectomy. Summary judgment was granted by the trial court based on the running of the statute of limitations.

On appeal, the plaintiff claimed that she had no knowledge of any connection between the subarachnoid block and the symptoms of bladder and rectal dysfunction. There was no evidence to the contrary in that case and the Supreme Court reversed. The Court's holding in Foil is consistent with the later cases but the decision produced some unfortunate language which was subsequently addressed.

Foil is one of the first cases addressing the meaning of the phrase "discovery of injury". Although Foil was not explicitly overruled, subsequent decisions by this Court and the Utah Supreme Court have modified and clarified the holding in Foil. Foil held that an injury is discovered, and the statute begins to run, "when an injured person knows or should know that he has suffered a legal injury." Id. at 147. A two prong test was enunciated by the court. A legal injury is discovered when a plaintiff knows or should have known (1) that he or she has sustained an injury, and (2) that the injury was caused by negligence. However, due to the absurd results that would have resulted from the literal application of this standard, the Utah Courts quickly began to broaden the standard. Essentially, if the language from Foil would have been adhered to, the statute of limitations for medical malpractice actions would not begin to run until there had been a legal determination of negligence.

Soon after Foil, in Hove v. McMaster, 621 P.2d 694 (Utah 1980), the Supreme Court had an opportunity to look at the same issue again. Hove was decided approximately one year after Foil and both opinions were written by Justice Stewart. Hove involved a case against a dentist who had given the plaintiff two injections for a filling. Following the injections, the plaintiff suffered some pain and tingling which she claimed she did not know were caused by the injections. She consulted the defendant about her problems one year after the treatment and was referred to a neurologist.

The neurologist informed plaintiff that her problems could be caused by one of four things, including the fact that it may be a complication from the dental injections given by the defendant. Over the next several years, the plaintiff visited several doctors due to her recurring pain and tingling. In each case she told the doctors about the dental injections but none of the doctors specifically attributed her problems to the injections. Finally, she went to a physician who told her that her problems were the result of the dental injections given by the defendant dentist.

The statute of limitations was raised as a defense and a bifurcated trial like that held in this instance was held to address that issue. The trial court held that plaintiff's action was barred by the statute of limitations and the Supreme Court affirmed. In upholding the trial court's decision, the Supreme Court held that the discovery of injury test was satisfied if the plaintiff knew or should have known "that the injury she suffered may have been caused by negligence on the part of the defendant." Id. at 697. Thus, under Hove, a plaintiff need only know of the possibility of a causal connection between her injury and the alleged negligent act.

Hove was relied upon by this Court in its recent decision in Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989). In Deschamps, this Court was faced with the same argument made to the Supreme Court in Hove; that a plaintiff does not know of her legal injury until she receives an expert medical opinion confirming malpractice. Plaintiff essentially makes the same argument in this instance. This Court rejected that argument as being inconsistent

with the purpose of the statute of limitations statutory scheme; noting that if plaintiff's argument were accepted the statute would be tolled in every case until a plaintiff not only decided to seek, but found favorable expert testimony. Id. at 475.

This Court further discussed the interpretation of "discovery of injury" in Floyd v. Western Surgical Associates, 773 P.2d 401 (Utah App. 1989). In Floyd, the plaintiff consulted a Dr. Wilcox in November of 1981 for severe heartburn. Dr. Wilcox referred the plaintiff to a Dr. Lindem for hiatal hernia surgery. The surgery was done by Dr. Lindem on December 9, 1981. However, Dr. Lindem performed two other surgical procedures of which the plaintiff was unaware of at that time.

After experiencing stomach pains over the next several months, the plaintiff consulted Dr. Lindem who at that time told him of the additional surgeries he had performed. This was in March or April of 1982. The plaintiff testified in his deposition that this was the first time he learned of the additional surgeries and that he knew at this time that these additional surgeries were the cause of his upset stomach and other problems. The plaintiff also testified that, in September of 1982, he informed Dr. Wilcox that Dr. Lindem had performed additional surgeries and that his problems were probably caused by the surgery.

The complaint was filed in March of 1986. In July of 1987 the trial court granted summary judgment in favor of the defendants, holding that the claim was time barred. This Court affirmed, stating the following reasoning:

In this case, unlike Foil, Floyd's deposition testimony establishes that Floyd was aware in September of 1982 that Dr. Lindem performed surgery in addition to the hiatal hernia surgery and that his symptoms were caused by the additional surgery. In contrast to Foil, Floyd had made the connection between the surgery and his symptoms, according to his clear deposition testimony. Therefore, by September 1982, at the latest, Floyd discovered or should have discovered the injury and that the additional surgical procedures caused his injury.

Id. at 404.

Finally, in Hargett v. Limberg, 598 F.Supp. 152 (D.Utah 1984), Judge Winder provided a succinct and logical analysis of the test to be applied in determining when the statute of limitations begins to run in medical malpractice cases:

Under Foil, and its progeny, a legal determination of negligence is not necessary to start the statute of limitations. Rather, the crucial question was whether the plaintiff was aware of the facts that would lead a reasonable person to conclude that he may have a cause of action against the health care provider. See, e.g., Reiser v. Lohner, 641 P.2d 93, 99 (Utah 1982); Hove v. McMaster, 621 P.2d 694, 696 (Utah 1980); Foil, 601 P.2d at 148. Those facts include the existence of an injury, its cause and the possibility of negligence.

Id. at 155.

Based on the above mentioned decisions rendered subsequent to Foil, which clarified the interpretation of U.C.A. § 78-14-4, plaintiff's reliance in his brief on Foil is misplaced.

In fact, plaintiff recognizes in his brief that Foil is no longer followed as precedent and notes that "subsequent Appellate Court decisions . . . have ignored the Supreme Court's instruction (in Foil) and have held that the requisite "knowledge" the plaintiff must have to satisfy the Foil test is mere awareness of a temporary disorder, Reiser v. Lohner, 641 P.2d 93 (Utah 1982); Duerden v. Utah Valley Hospital, 663 F.Supp. 781 (D.Utah 1987); or

the mere belief that a patient's symptoms were unavoidable side effects of treatment, Floyd v. Western Surgical Associates, 773 P.2d 401 (Utah App. 1989); Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989)." See Brief at 19. Plaintiff further adds that the above cited cases "have misapplied the Foil "knowledge of injury" test" (See Brief of Appellant, p. 19). Finally, plaintiff later states in his brief that "the District Court's decision erroneously interpreted Foil to mean that the statute runs from two years when a plaintiff knew or should have known that he had suffered an injury which may have been caused by Defendants." (See Brief of Appellant, p. 43).

In making the above statements, plaintiff is asserting that the reasoning and analysis applied in every case decided since Foil is flawed and incorrect. Additionally, by criticizing the trial court's interpretation of § 78-14-4 plaintiff is in essence criticizing those decisions relied on by the trial court in reaching its decision. As mentioned above, the trial court relied upon recent decisions by this Court and other Utah courts in its interpretation of § 78-14-4. Instead of addressing those cases decided subsequent to Foil, plaintiff relies on language from Foil which does not represent an accurate interpretation of § 78-14-4.

For example, plaintiff argues that the knowledge of injury prong enunciated in Foil is not met until a plaintiff knows the full nature, extent, severity and permanence of the injury. Plaintiff further asserts that he was not aware of the full nature, extent, severity and permanence of his injury until he was told so by Dr. Dayton in September 1987. However, the record before the

trial court establishes that plaintiff was reporting to medical providers as early as April or May of 1984 that he attributed his sexual problems to his second surgery in February 1984. Moreover, Dr. Dayton testified before the trial court that he did not tell plaintiff that a complication from his surgery was the most likely cause of his sexual dysfunction. (R. at 1173).

Plaintiff's argument also fails because the evidence presented at trial clearly established that plaintiff was fully aware of the nature, extent, severity and permanence of his perceived injuries. This evidence was previously addressed above when discussing the trial court's Findings of Fact. Additionally, this Court, the Utah Supreme Court and the United States District Court for the District of Utah have specifically addressed this issue and held that a plaintiff need not know the full nature, extent, severity and permanence of an injury for the statute of limitations to begin running.

In Reiser v. Lohner, 641 P.2d 93 (Utah 1982), the Utah Supreme Court addressed the very argument plaintiff makes in his brief; that he believed his injuries were temporary and was not aware of their permanent nature until 1987. The Supreme Court rejected the argument that the statute of limitations does not run because of a belief that the injury was temporary. In doing so, the Court stated:

Mr. Reiser filed an affidavit wherein he asserted a belief that his wife's disorders were temporary and that he did not become aware of any permanent damage until June, 1972. Such declaration of his belief was not sufficient to raise an issue of fact. Furthermore, the very acknowledgment that his wife was suffering disorders as a result of the incident (whether temporary or

permanent) would show that plaintiffs should have known that they had suffered legal injury at the time of the cardiac arrest.

Id. at 100.

This very same issue was also addressed by the Federal District Court in Duerden v. Utah Valley Hospital, 663 F.Supp. 781 (D.Utah 1987), where Judge Greene interpreted Utah law and relied on the Reiser case. In Duerden, plaintiff argued that his lack of knowledge that the injury was permanent and his belief in its temporary nature tolled the statute of limitations. Judge Greene rejected this argument and held that a plaintiff need only know he is suffering a disorder to begin the running of the statute of limitations. Id. at 784 (emphasis added). The Court added the following:

Under Reiser, the threshold knowledge the injured party must have to satisfy the first prong of the Foil test is knowledge that she is suffering a "disorder." Under this view, the statute begins to run upon acquisition of such knowledge, whether or not the injured party is aware of the extent of her injury, the actual malady suffered, or the permanent nature of her symptoms.

Id. at 784.

Thus, knowledge of a disorder, whether temporary or permanent, is sufficient to start the statute of limitations in medical malpractice actions.

Finally, this Court addressed a similar argument in Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989). In Deschamps, this Court addressed the daughter's argument that she did not know of her mother's legal injury because she was led to believe her mother's death was the result of unavoidable side effects.

Plaintiff has similarly argued in this instance that, despite his knowledge of his alleged injury and its cause, he did not discover a legal injury for purposes of the statute of limitations because he was misled by Dr. Becker as to the cause of his injury. This argument was previously addressed above when responding to plaintiff's challenge to Findings of Fact 18 and 19. However, even if plaintiff's allegations that he was misled were true, although there is absolutely no evidence supporting them, this Court rejected such an argument in Deschamps:

This court recently upheld the granting of summary judgment under section 78-14-4, finding that the plaintiff as a matter of law knew that his injuries were caused by medical malpractice more than two years before he filed his complaint. Floyd v. Western Surgical Assocs., Inc., 773 P.2d 401, 405 (Utah Ct.App. 1989). We rejected the plaintiff's argument that he did not know of his legal injury because he was led to believe his symptoms were unavoidable side effects of his treatment. Id. at 403. Again, this court previously has rejected the position urged by Ms. Deschamps that she did not know of her mother's legal injury because she was led to believe her mother's death was the result of unavoidable side effects.

Id. at 474.

[Plaintiff also relies on the case of Christiansen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (Utah 1968), for the proposition that the plaintiff must know of the permanence of the injury. However, this case arose under the old four year statute of limitations (§ 78-12-25(2)) and involved leaving a surgical needle in the plaintiff's body. Thus, Christiansen has no application to the facts in this instance.]

Despite the utter lack of supporting evidence, and the substantial evidence to the contrary, plaintiff continues to assert

throughout his brief that although he was generally aware of a medical problem, he was not aware of the nature and extent of his injuries. He further asserts that he relied on the representations by defendants that his problem was temporary and was not caused by the surgery. However, these assertions are absurd in light of the evidence presented to the trial court that as early as May 1984 plaintiff was attributing the cause of his perceived sexual dysfunction to his surgery in February 1984.

Finally, plaintiff asserts in a footnote that he should not be held to have knowledge of his injury because the trial court and defendants doctors cannot agree on whether plaintiff actually suffered an injury. This argument fails for several reasons. First, it is plaintiff's perception of his injuries that is evaluated for purposes of the running of the statute of limitations, not the trial court's or defendants. As discussed, the evidence is clear that plaintiff believed he suffered an injury. Second, the question of whether plaintiff has suffered an injury goes to the merits of plaintiff's malpractice claim and not to the statute of limitations issue.

2. A plaintiff need not have knowledge that his injuries are the result of negligence.

Plaintiff also argues in his brief that the statute of limitations does not run until a plaintiff has knowledge of the cause of his injury and knows that the injury was the result of improper treatment. The first question of whether plaintiff knew of the cause of his alleged sexual dysfunction has been fully addressed above. As noted, the evidence is clear that plaintiff

was attributing the cause of his problems to his second surgery in February 1984 and that he became aware of this knowledge no later than May 1984.

Plaintiff's claim that he must also know that his injury was the result of negligence is without merit. As reviewed above, this is not the law with regard to § 78-14-4. For obvious reasons, a requirement such as this would lead to absurd results. In essence, an admission or a legal determination of negligence would be required before the statute of limitations would run. This is certainly contrary to the purpose behind the enactment of § 78-14-4. In Deschamps, this Court stated the following when faced with the argument that a plaintiff does not know of her legal injury until she receives an expert medical opinion confirming malpractice:

If we accepted Ms. Deschamps's position that she could not know of her legal injury until she received an expert medical opinion confirming malpractice, the statute would be tolled in every case until a plaintiff not only decided to seek, but found favorable expert medical testimony. We do not believe this result is consistent with the purpose of the statutory scheme.

Id. at 475.

The remainder of plaintiff's argument with regard to this issue is essentially the same as that made previously in his brief; that he was told the surgery was not the cause of his problems, that he relied on defendants, and that he did not have knowledge of his injury until his visit with Dr. Dayton on September 15, 1987. Since these allegations have been previously addressed above, defendants will not address them further. However, it should be noted that plaintiff's version of what Dr. Dayton told him is not

supported by Dr. Dayton's testimony. Dr. Dayton testified before the trial court that he did not tell plaintiff that a complication from his surgery was the most likely cause of his sexual dysfunction. (R. at 1173). It is clear that plaintiff learned nothing from his visit with Dr. Dayton that he did not already know.

B. The trial court's decision that the continuing treatment doctrine was inconsistent with § 78-14-4 and not applicable in Utah was correct.

Plaintiff's next argument in his brief is that the trial court erred in finding, as a matter of law, that the "continuing treatment" doctrine was inconsistent with the statute of limitations passed by the legislature and was not applicable since the passage of this section (§ 78-14-4). The trial court's decision on this issue was based on the trial briefs presented by the parties and the arguments of counsel at trial. It should be noted that plaintiff cited no Utah authority in his trial brief in support of his argument. (R. 531, 554-556, 1720).

The "continuing treatment" doctrine has been adopted by some jurisdictions as a judicial doctrine to avoid the harsh result of a plaintiff's claim being barred before a plaintiff knows that there is a claim. The basis for the doctrine is to avoid those situations where discovery is delayed because of a continuing doctor/patient relationship. However, states which have adopted a discovery of injury statute of limitations for medical malpractice actions analogous to that adopted in Utah have rejected the continuous treatment doctrine as obsolete. The Washington Supreme

Court came to such a conclusion in Bixler v. Bowman, 614 P.2d 1290 (Wash. 1980);

Likewise, the 1971 statute substantially modified the continuing course of treatment rule formulated in Samuelson v. Freeman, Supra. Under Samuelson, the cause of action would not accrue until, when there was a continuous and substantially uninterrupted course of treatment for a particular illness, the treatment for the particular illness or condition had been terminated. The 1971 statute restricts the commencement of the action to within "three years from the date of the alleged wrongful act". The concept of the termination of a "continuing course of treatment" has been succeeded by the designation of a "date of the alleged wrongful act".

Id. at 1292.

An opinion from the Kansas Supreme Court supports the same conclusion. In discussing the "continuous treatment" doctrine and the "physician-patient relationship" doctrine, the Kansas Supreme Court stated the following:

An examination of the cases in which either of the two doctrines was adopted reveals that generally the treatment was a judicial effort to soften the harshness of the statutory accrual rule existing in the particular jurisdiction at the time. The Kansas Legislature did not see fit to mention either "physician-patient relationship" or "continuous treatment" as an element in measuring the time in which a cause of action accrues. We are not inclined to do so by judicially legislating.

Hecht v. First National Bank & Trust Company, 490 P.2d 649, 656, 657 (Kansas 1971).

Although plaintiff relies on the case of Hundley v. St. Francis Hospital, 327 P.2d 131 (Cal. App. 1958) in support of his argument, this case addresses the physician/patient relationship

doctrine. This doctrine is a minority position which holds that the statute of limitations is tolled while the physician/patient relationship continues. Further, this doctrine was not argued by plaintiff before the trial court and is different from the continuing treatment doctrine.

Defendants assert, and the trial court agreed, that the continuing treatment doctrine serves no purpose and is overruled in Utah by the legislatures passage of § 78-14-4. Section 78-14-4 provides (1) a two year discovery of injury provision; (2) a four year statute of repose; (3) a foreign object exception; and (4) a fraudulent concealment exception.

In fact, the fraudulent concealment exception is very similar to the continuing treatment doctrine. One of the purposes of the continuing treatment doctrine was to prevent the abuse of the physician/patient relationship by the physician to conceal a wrongful act. Thus, if the trial court had held that the continuing treatment doctrine was applicable in this instance, it would have put an additional exception into § 78-14-4 not provided for by the legislature.

C. The trial court's decision that the continuing treatment doctrine was not applicable, even in the absence of § 78-14-4, was correct.

Although the trial court found that the continuing treatment doctrine was not applicable in Utah since the passage of § 78-14-4, the court also held, as a matter of law, that the doctrine would not apply to this case even in the absence of § 78-14-4. This decision was based on the trial court's factual findings that plaintiff possessed all of the knowledge and information pertaining

to his alleged injury and possible causes during the time he was being treated by defendants which he possessed at the time he commenced this action and he was not misled or prevented from obtaining any information as a result of any continuing treatment. (R. at 1088). Plaintiff argues that this conclusion of law was in error.

Even if the continuing treatment doctrine were recognized in Utah, it would not apply to the facts of this case. To begin with, there was abundant evidence establishing that plaintiff had sufficient knowledge of his injury to commence the running of the statute of limitations as early as May 1984. The doctrine was not developed to toll the statute of limitations when a plaintiff knows he has a cause of action. Further, as discussed above, there is no evidence that plaintiff was misled or prevented from discovering information about his alleged injuries as a result of any continuous course of medical treatment.

One of the primary purposes for the continuing treatment doctrine is for a situation where no single incident in a continuous chain of negligence can be identified as the cause of the harm. In such a situation, the doctrine is applied to prevent injustice. The continuing treatment doctrine would not serve such a purpose in this instance. As plaintiff himself admits, the claims in this case clearly result from one specific incident, the second surgery on February 27, 1984. Plaintiff's attempt to invoke the doctrine in this instance was simply an effort to avoid

his known failure to comply with the statute of limitations. The trial court's decision that the doctrine did not apply to the facts in this instance was correct.

POINT IV

PLAINTIFF'S APPEAL IS FRIVOLOUS.

Rule 33 of the Utah Rules of Appellate Procedure provides in part:

If the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, . . .

Rule 33 further defines a frivolous appeal as "not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law." Plaintiff's brief in this instance meets the above definition of frivolous.

This Court has held appeals to be frivolous in several recent decisions when faced with arguments similar to that presented by plaintiff in this instance. In O'Brien v. Rush, 744 P.2d 306 (Utah App. 1987), this Court held the defendant's appeal to be frivolous and stated the following:

The record further shows the trial judge carefully fashioning relief after a fair opportunity for hearing. Defendant's claims on appeal simply controvert the findings of the court. The claims are not only without merit but are without basis in law or fact. Plaintiff is entitled to the benefit of Rule 33(a).

Id. at 310.

Further, in another situation similar to this instance, Eames v. Eames, 735 P.2d 395 (Utah App. 1987), this Court found the defendant's appeal to be frivolous and noted the following:

The record shows the trial judge making Findings of Fact, dividing the property, and awarding support after a careful consideration of all the evidence. Defendant ignores this.

Id. at 397-398.

This Court in Eames further emphasized the defendant's refusal to acknowledge and accept the uncontroverted evidence presented to the trial court as a factor in its decision to find defendant's appeal frivolous.

As discussed at length above, plaintiff in this instance has completely ignored and refused to accept the uncontradicted evidence presented to the trial court. The record establishes that the trial court made its Findings of Fact and Conclusions of Law after a careful consideration of the evidence. Instead of addressing this evidence, plaintiff simply controverts the trial court's findings. In light of the clear and abundant evidence presented at trial, plaintiff's challenges to the trial court's Findings of Fact are without basis in fact and are frivolous.

Additionally, plaintiff's challenge to the trial court's Conclusions of Law, specifically the trial court's interpretation of § 78-14-4, is not warranted by existing law and is not based on a good faith argument to extend, modify, or reverse existing law. Plaintiff essentially admits this in his brief when he notes that subsequent appellate court decisions have not followed and have misapplied Foil, the case he relies on to support his argument. (See Brief of Appellant, p. 19). The trial court's interpretation of § 78-14-4 was based on existing case precedent from Utah

Appellate Courts that have interpreted § 78-14-4. (R. at 1047-1048). Thus, plaintiff's appeal is frivolous.

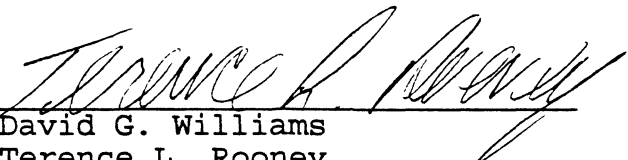
CONCLUSION

Based on the foregoing arguments and authorities, the trial court's decision dismissing plaintiff's action because it was not commenced within the time required by the applicable statute of limitations, U.C.A. § 78-14-4, should be affirmed. The trial court's Findings of Fact were supported by the evidence and its Conclusions of Law were correct. Beginning in May 1984 and continuing thereafter, plaintiff knew and reasonably should have known that his second surgery in February 1984 was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants. Plaintiff's claim was not commenced until January 15, 1988. Thus, plaintiff's claim was time barred pursuant to U.C.A. § 78-14-4.

DATED this 23TH day of SEPTEMBER, 1992.

SNOW, CHRISTENSEN & MARTINEAU

By



David G. Williams
Terence L. Rooney
Attorneys for Defendants/Appellees

CERTIFICATE OF SERVICE

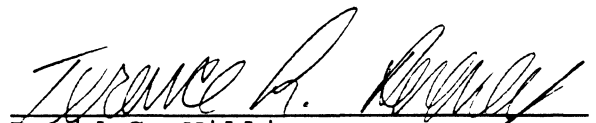
I hereby certify that I caused to be hand-delivered, four (4) copies of the BRIEF OF THE APPELLEES, this 28th day of September, 1992, to the following:

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SNOW, CHRISTENSEN & MARTINEAU

By



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ADDENDUM

Tab A

(31) "Tort" means any legal wrong, breach of duty, or negligent or unlawful act or omission proximately causing injury or damage to another.

1992

78-14-4. Statute of limitations — Exceptions — Application.

(1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence, except that:

(a) In an action where the allegation against the health care provider is that a foreign object has been wrongfully left within a patient's body, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the existence of the foreign object wrongfully left in the patient's body, whichever first occurs; and

(b) In an action where it is alleged that a patient has been prevented from discovering misconduct on the part of a health care provider because that health care provider has affirmatively acted to fraudulently conceal the alleged misconduct, the claim shall be barred unless commenced within one year after the plaintiff or patient discovers, or through the use of reasonable diligence, should have discovered the fraudulent concealment, whichever first occurs.

(2) The provisions of this section shall apply to all persons, regardless of minority or other legal disability under Section 78-12-36 or any other provision of the law, and shall apply retroactively to all persons, partnerships, associations and corporations and to all health care providers and to all malpractice actions against health care providers based upon alleged personal injuries which occurred prior to the effective date of this act; provided, however, that any action which under former law could have been commenced after the effective date of this act may be commenced only within the unelapsed portion of time allowed under former law; but any action which under former law could have been commenced more than four years after the effective date of this act may be commenced only within four years after the effective date of this act.

1979

78-14-4.5. Amount of award reduced by amounts of collateral sources available to plaintiff — No reduction where subrogation right exists — Collateral sources defined — Procedure to preserve subrogation rights — Evidence admissible — Exceptions.

(1) In all malpractice actions against health care providers as defined in Section 78-14-3 in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of such award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him; however, there shall be no reduction for collateral sources for which a subrogation right exists as provided in this section nor shall there be a reduction for any collateral payment not included in the award of damages. Upon a finding of liability and an awarding of damages by the trier of fact, the court shall receive evidence concerning the total amounts

of collateral sources which have been paid to or for the benefit of the plaintiff or are otherwise available to him. The court shall also take testimony of any amount which has been paid, contributed, or forfeited by, or on behalf of the plaintiff or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury, and shall offset any reduction in the award by such amounts. No evidence shall be received and no reduction made with respect to future collateral source benefits except as specified in Subsection (4).

(2) For purposes of this section "collateral source" means payments made to or for the benefit of the plaintiff for:

(a) medical expenses and disability payments payable under the United States Social Security Act, any federal, state, or local income disability act, or any other public program, except the federal programs which are required by law to seek subrogation;

(b) any health, sickness, or income disability insurance, automobile accident insurance that provides health benefits or income disability coverage, and any other similar insurance benefits, except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others;

(c) any contract or agreement of any person, group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except benefits received as gifts, contributions, or assistance made gratuitously; and

(d) any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.

(3) To preserve subrogation rights for amounts paid or received prior to settlement or judgment, a provider of collateral sources shall serve at least 30 days before settlement or trial of the action a written notice upon each health care provider against whom the malpractice action has been asserted. The written notice shall state the name and address of the provider of collateral sources, the amount of collateral sources paid, the names and addresses of all persons who received payment, and the items and purposes for which payment has been made.

(4) Evidence is admissible of government programs that provide payments or benefits available in the future to or for the benefit of the plaintiff to the extent available irrespective of the recipient's ability to pay. Evidence of the likelihood or unlikelihood that such programs, payments, or benefits will be available in the future is also admissible. The trier of fact may consider such evidence in determining the amount of damages awarded to a plaintiff for future expenses.

(5) No provider of collateral sources is entitled to recover the amounts of such benefits from a health care provider, the plaintiff, or any other person or entity as reimbursement for collateral source payments made prior to settlement or judgment, including any payments made under Title 26, Chapter 19, except to the extent that subrogation rights to amounts paid prior to settlement or judgment are preserved as provided in this section. All policies of insurance providing benefits affected by this section are construed in accordance with this section.

1992

Tab B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

G. KEVIN JONES,	:	COURT'S DECISION
Plaintiff,	:	CIVIL NO. C-88-2736
vs.	:	
THE STATE OF UTAH; THE	:	
UNIVERSITY OF UTAH; THE	:	
UNIVERSITY OF UTAH HOSPITAL	:	
AND MEDICAL CENTER; and	:	
JAMES M. BECKER, M.D.,	:	
Defendants.	:	

The above-entitled matter came before the Court for a bifurcated trial commencing on November 12, 1991 on the issue of whether the statute of limitations had run as to the plaintiff's cause of action against the defendants.

The Court having considered the testimony that was adduced, the evidence received, arguments of counsel and the applicable law has reached this decision.

The Court finds from the evidence presented that the plaintiff, Kevin Jones, knew or should have known that he had sustained an injury and the causation of the same, on or about May of 1984.

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Exhibit P-4, a letter dated May 29, 1984, from Dr. Becker to Dr. Middleton clearly indicates that Mr. Jones had discussed his sexual dysfunction with Dr. Becker prior to the date of the letter. Further, this letter indicates defendant had been "told by his family doctor that he might be impotent, secondary to his surgery." (line 24 of Exhibit 4).

There is other evidence that supports the finding that plaintiff discovered "the injury" and made the causal connection between the problem and the surgery in April or May of 1984. The Court finds there has been no showing of any fraudulent concealment of plaintiff's injury by defendants or anyone else.

Therefore, plaintiff had two years from May of 1984, the point of discovery, in which to file an Intent to Commence Legal Action.

The Court finds the evidence is uncontroverted that the plaintiff's Notice of Intent to Commence Action was not filed until December of 1987.

It is clear from a reading of Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989), that a medical malpractice claim must be filed within the statute of limitations period and that the fact that a plaintiff's physicians do not render an expert

opinion supportive of malpractice and in fact may have discouraged suit, does not excuse the plaintiff's failure to file a timely claim. The Court in Deschamps v. Pulley, concludes that knowledge of a legal injury does not require an expert opinion confirming malpractice or the "statute would be tolled in every case until a plaintiff. . . found favorable expert medical testimony." (at p. 475).

The Court finds that discovery occurs when a plaintiff knows or should have known he might have a cause of action. There is no legal authority for the proposition that "discovery" does not occur until a plaintiff is absolutely sure of the cause of his injury. For example, in the instant case there still appears to be a real fact question about the nature and existence of any sexual dysfunction and the cause.

The Court finds the testimony of Dr. Becker concerning the plaintiff's condition to be credible. Dr. Becker stated, "Mr. Jones has ill defined sexual dysfunction. . . the cause is hard to pinpoint. Objective evaluation has been equivocal in terms of clarifying what it is and if it exists." This evaluation appears to still be accurate, based upon the totality of testimony adduced. The Court finds Dr. Becker told plaintiff of the risk of surgery, including the risk of sexual

dysfunction, and that the plaintiff knew of this possibility before surgery; and that he related the sexual dysfunction he experienced to the surgical process, shortly after undergoing the second surgery. The Court finds plaintiff's articulated desire to have his sperm banked would not have been made but for knowledge of the risk of sexual dysfunction.

The Court has considered plaintiff's demeanor and testimony, and finds that the plaintiff's demeanor, attitude and the content of his answers, reveals him to be an intelligent, careful man. Plaintiff's answers in court reflected a great attention to detail. The Court so finds and further notes plaintiff is a lawyer, who understands the concept of informed consent. The Court finds the plaintiff had access to the Mayo Clinic pamphlet and read the same. The Court finds that the plaintiff clearly testified that in 1984, he knew of changes in his sexual function or "system", i.e., no ejaculent and diminished erections (Ex. D-4).

Plaintiff's specific testimony at trial was that he masturbated to "test" his sexual function after the first surgery, and again after the second surgery, and that he noticed and reported sexual problems in April or May of 1984. Plaintiff testified that after the "testing", following his

first surgery, he felt relief and stated, "at least I got through that one okay". The plaintiff's reference to "that one" was clearly a reference to surgery. Plaintiff also testified that he masturbated again after the second surgery and discovered what he perceived to be sexual dysfunction. The plaintiff and his parents, Veda and Garth Jones, testified that he disclosed the sexual dysfunction to them in May of 1984 and the surgery was discussed as a cause at that time. Garth Jones testified that he called Dr. Becker and asked questions regarding the "consequences of this operation" in relation to the sexual dysfunction. The evidence supports that in late April or May of 1984, the plaintiff told Dr. Becker he was experiencing no ejaculation. The testimony reflects that Dr. Becker discussed possible causes at that time and made referrals to Dr. Middleton and Dr. Hammond to further explore any sexual dysfunction. All of the physicians to whom plaintiff was referred, were advised of the dysfunction problem and plaintiff's concern about it being linked to the colon surgery.

In Exhibit D-17, the deposition of Dr. Becker, Dr. Becker stated (at p. 98), that he told the plaintiff, referring to plaintiff's complaint of sexual dysfunction, "It is unlikely to

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be the result of surgery." However, Dr. Becker goes on to say that surgery as a cause was discussed and "surgery was never ruled out" as a possible cause of the plaintiff's problems. It appears that plaintiff was on notice at this time of the problem and the potential causes, including the surgery.

The Court finds that while the plaintiff testified he didn't relate his sexual dysfunction to nerve injury from surgery until September, 1987, that is belied by the other evidence and by the totality of his own testimony. Further, the Court finds that the plaintiff's contention that he didn't think sexual dysfunction was a real risk, and wasn't advised of the same, is not credible in view of the totality of the testimony, including plaintiff's testimony that he considered and requested his sperm be banked.

The Court finds that when the plaintiff got Dr. Dayton's opinion in September 1987, this only confirmed the plaintiff's own conclusion formed in 1984 as to the problem and its cause.

The Court finds that the plaintiff found other theories on causation unacceptable. For example, plaintiff found Dr. Hammond's explanation, of a possible psychological cause for the dysfunction, incredible and "unsatisfactory" and never believed this to be the cause. The plaintiff's actions,

including his failure to pursue psychological treatment, makes it clear that plaintiff never believed his problems were psychological. Exhibit D-11 establishes that in early 1985, Dr. Franklin L. Smith, a urologist, was asked by the plaintiff if surgery had caused his problem.

The fact that Dr. Becker did not acknowledge in 1984 or now that plaintiff has a permanent sexual dysfunction problem caused by surgery, is immaterial to the issue of plaintiff's knowledge. Dr. Franklin L. Smith's testimony referred to plaintiff's request for information regarding the nexus between surgery and sexual dysfunction (See Exhibit P-14) and this Doctor indicated the plaintiff reported sexual problems starting "after the second operation in February of 1984".

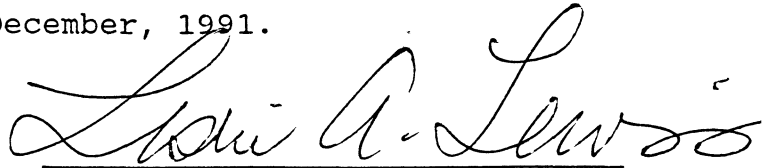
Finally, Terry Stoker's testimony supports the 1984 discovery by plaintiff.

Ms. Stoker testified that the plaintiff indicated he "contemplated suing" repeatedly. She clearly states threats of a lawsuit were made as early as 1985.

The Court finds the continuing treatment doctrine is inconsistent with the statute of limitations passed by the Utah legislature.

Based upon the foregoing, the Court orders that counsel for the defendants, Mr. Williams, is to prepare more detailed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and submit them as required under the Third District Court Rules of Practice.

Dated this 18th day of December, 1991.

A handwritten signature in cursive script, reading "Leslie A. Lewis". The signature is written in dark ink and is positioned above the printed name and title.

LESLIE A. LEWIS
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Court's Decision, to the following,
this 19 day of December, 1991:

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Tab C

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FILED IN JUDICIAL DISTRICT
Third Judicial District

JAN 23 1992

E. Matheson

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

G. KEVIN JONES,

Plaintiff,

vs.

THE STATE OF UTAH; THE
UNIVERSITY OF UTAH; THE
UNIVERSITY OF UTAH HOSPITAL
AND MEDICAL CENTER; and JAMES
M. BECKER, M.D.,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Civil No. C88-2736

Judge Leslie A. Lewis

This matter was tried to the Court, without a jury, on November 12, 13 and 25, 1991. In accordance with § 78-12-47, UCA (1953 as amended) the trial was limited to the issues pertaining to defendants' statute of limitations defense. Plaintiff was present at trial and represented by his counsel of record. Defendants were represented at trial by their counsel of record. Plaintiff and defendants adduced evidence through witnesses and exhibits and each rested. The Court having heard closing arguments from counsel for plaintiff and defendants and having reviewed the

trial briefs submitted by plaintiff and defendants hereby enters the following:

FINDINGS OF FACT

1. In 1981 plaintiff was diagnosed as having chronic ulcerative colitis. He was treated for that condition with *LAL* ~~Azulfadine~~ and Prednisone by Dr. Clifford Harman, a gastroenterologist, through December 1983.

2. In November 1982 plaintiff consulted with Dr. James Becker at the University of Utah School of Medicine concerning surgical options for treatment of his ulcerative colitis, including specifically the ileoanal anastomosis procedure. Between November 1982 and December 1983 plaintiff's parents also visited with Dr. Becker regarding surgical options for treatment of plaintiff's disease.

3. In October 1983 plaintiff visited the Mayo Clinic in Rochester, Minnesota where Dr. Huizenga, a gastroenterologist, confirmed the diagnosis of chronic ulcerative colitis and entered plaintiff into a study protocol for an investigational drug (5ASA) for the treatment of ulcerative colitis.

4. Plaintiff did not respond favorably to the 5ASA treatment and in December 1983 his ulcerative colitis became so severe that he was admitted to Holy Cross Hospital. In the opinion of his treating gastroenterologist, Dr. Harman, medical therapies had been exhausted and surgery was necessary to save plaintiff's life.

5. In January 1984 plaintiff and his parents discussed the surgical options with Dr. Becker. Plaintiff elected to undergo the

ileoanal anastomosis procedure after having been fully informed concerning the risks and benefits of that procedure and of the alternative procedures.

6. Dr. Becker advised plaintiff that the risk of sexual dysfunction was lower with the ileoanal anastomosis procedure than with the alternative procedures, but that sexual dysfunction was a risk of the procedure.

7. In January 1984 Dr. Becker explained to plaintiff that the ileoanal anastomosis procedure would be performed in three separate operations.

8. On January 5, 1984, the first phase of the ileoanal anastomosis, removal of most of the colon and the creation of a temporary ileostomy, was performed by Dr. Becker on plaintiff.

9. The first phase of the procedure was completed without complications. Following completion of the first phase and prior to the second phase of the procedure, plaintiff masturbated to test his sexual function. At that time he felt relieved and stated "at least I got through that one okay", referring to the first surgery.

10. On February 27, 1984, plaintiff underwent the second phase of the ileoanal anastomosis procedure, the mucosal proctectomy or removal of the mucosal lining from the rectum. Again, prior to this procedure the risks were explained to plaintiff by Dr. Becker, including the risk of sexual dysfunction.

11. In April or May 1984 plaintiff discovered what he perceived to be sexual dysfunction, including lack of ejaculation and diminished frequency and quality of erections.

12. In May 1984 plaintiff reported his perceived sexual dysfunction to his parents and to Dr. Becker. At that time he reported to Dr. Becker that he had been told by his family doctor that he might be impotent, secondary to his surgery.

13. In May 1984 Dr. Becker referred plaintiff to Dr. Middleton, a urologist, and to Dr. Hammond, a psychologist and sex therapist, to explore the reported sexual dysfunction.

14. Since May 1984, in discussions and correspondence with various physicians, plaintiff has repeatedly causally related his perceived sexual dysfunction to the second operative procedure performed in February 1984.

15. Since April or May 1984, plaintiff has had an ill defined sexual dysfunction, the cause of which has not been definitively determined. ~~Objective evaluations have been equivocal in terms of clarifying the perceived dysfunction.~~ LaL

16. Beginning in May 1984 and continuing thereafter, plaintiff knew and reasonably should have known that the second surgery performed in February 1984 was a possible cause of his perceived sexual dysfunction and that he might have a cause of action against defendants.

17. Plaintiff did not accept or rely upon any other theories of causation suggested by defendants or any other physicians. Specifically, plaintiff rejected and did not rely upon any suggestion that there may be a psychological cause of his perceived sexual dysfunction.

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18. Plaintiff was never misled or deceived in any manner concerning the possible causes of his perceived sexual dysfunction.

19. Defendants did not fraudulently represent or conceal any information relevant to plaintiff's treatment, recovery or perceived sexual dysfunction.

~~20. Dr. Merril Dayton did not provide plaintiff any information in September 1987 concerning possible causes of plaintiff's perceived sexual dysfunction of which plaintiff was not previously aware.~~ L62

21. During the years 1984 and 1985 plaintiff considered suing defendants for medical malpractice based on his perceived sexual dysfunction and general dissatisfaction with the outcome of his surgeries.

22. On June 28, 1984 the third and final phase of the ileoanal anastomosis procedure was performed and completed.

23. All surgeries and treatment performed and rendered by defendants were provided at the University of Utah Medical Center.

24. Dr. Becker was at all times relevant hereto a full time employee and faculty member in the Department of Surgery at the University of Utah School of Medicine.

25. Plaintiff's Notice of Intent to Commence Action was not served until December 4, 1987.

26. This action was commenced April 26, 1988.

27. Plaintiff's action was not commenced within two years after he knew and reasonably should have known of his perceived sexual dysfunction and general dissatisfaction with the outcome of

his surgeries and that he might have a claim for malpractice against defendants.

Based upon the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The applicable statute of limitations in this case is § 78-14-4, UCA (1953 as amended).

2. Plaintiff's action was not commenced within the time required by § 78-14-4 and his action is therefore barred.

3. The two year limitation period provided in § 78-14-4 commences when the plaintiff discovers or through the use of reasonable diligence should have discovered that he or she has an injury and that he or she might have a cause of action based on the injury. Commencement of the limitation period is not delayed until a plaintiff is advised by an "expert" that a valid claim exists or otherwise knows with certainty the cause of the injury or that the defendants were negligent.

4. An action is commenced for purposes of the statute of limitations when the complaint is filed, but in this case the action was not timely whether the commencement of action is deemed to be December 4, 1987 when the Notice of Intent was served, or April 26, 1988 when the Complaint was filed.

5. In addition to the relevant findings of fact, the Court concludes as a matter of law, that defendants did not fraudulently conceal any alleged misconduct and that plaintiff was not prevented

from discovering any misconduct on the part of defendants by any fraudulent concealment.

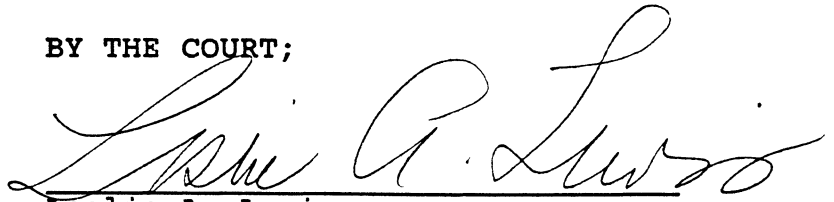
6. The "continuing treatment doctrine" is not applicable since the legislature passed § 78-14-4, UCA (1953 as amended).

7. The continuing treatment doctrine would not apply to this case, even in the absence of § 78-14-4, because of the Court's factual findings that plaintiff possessed all of the knowledge and information pertaining to his alleged injury and possible causes during the time he was being treated by defendants which he possessed at the time he commenced this action and he was not misled or prevented from obtaining any information as a result of the continuing treatment.

8. Because plaintiff's action was not commenced within the time required by § 78-14-4, the applicable statute of limitations, it is not necessary for the Court to rule on defendants' defense that the action was not commenced within the shorter period of time required by § 63-30-12, UCA (1953 as amended).

DATED this 23rd day of January, 1992.

BY THE COURT;


Leslie A. Lewis
District Judge

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

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09/05/93

